

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S
APPENDIX**

Orig. with Affidavit of mailing

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Pof 5

74-2656

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2656

UNITED STATES OF AMERICA,

Appellee,

—against—

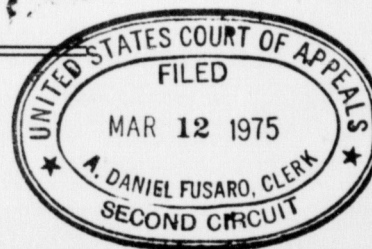
SALVATORE POLISI,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

GOVERNMENT'S APPENDIX

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*



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Stenographer's Transcript dated May 31, 1974. . A-1

Excerpt from Appellant's Appendix in United
States v. Vowter, 500 F.2d 1210 (2d Cir.)
cert. denied, _____ U.S. _____, 43 U.S.L.W.
3349 (1974) A-18

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

A 1

-----x
UNITED STATES OF AMERICA, :
-against- :
SALVATORE DANIEL POLISI, :
Defendant. :
-----x

72-CR-390

United States Courthouse
Brooklyn, New York
May 31, 1974
11:30 o'clock a.m.

B e f o r e :

HONORABLE EDWARD R. NEAHER, U.S.D.J.

BURTON SULZER
OFFICIAL COURT REPORTER

Appearances:

EDWARD J. BOYD V, ESQ.,
United States Attorney
for the Eastern District of New York

BY: KENNETH KAPLAN, ESQ.,
Assistant United States Attorney

SALVATORE QUAGLIATA, ESQ.,
Attorney for the defendant

1 THE COURT: Mr. Quagliata, is there any reason
2 why sentence shouldn't be imposed on this defendant
3 at this time?

4 MR. QUAGLIATA: There is no legal reason, but
5 there are certain facts that I would like to bring to
6 the attention of the Court and possibly the Court would
7 want to defer sentence.

8 Sir, the report indicates that this defendant
9 has been receiving treatment in the Veterans' Hospital
10 since April of 1973. I have spoken with the defendant
11 regarding that portion of the report as well as other
12 portions.

13 He advises me that he's been under their constant
14 care since the date of his discharge, although the
15 dosage that he was getting in connection with his
16 mental problems was increased, evidently.

17 Also, Judge, there are other portions of the
18 report which don't jibe with the information that we
19 have nor the information that the wife imparts to us,
20 or the defendant.

21 Firstly, sir, I have a recollection that there
22 is a case that is mentioned in there about destroying
23 evidence. That is incorrect. This defendant pleaded
24 guilty to bookmaking as a misdemeanor before Judge Judd
25 and I don't believe that that charge had anything to do

1 with destroying evidence.

2 Secondly, sir, I might state that there are
3 other charges in his rap sheet, as it's given to the
4 Court, which are not complete.

5 For instance, the charge -- where it correctly
6 states that he was charged with felonious assault on
7 a police officer, that charge was dismissed -- with-
8 drawn.

9 The Grand Jury after hearing the testimony
10 in that charge didn't indict him. There were three
11 witnesses; two, I believe were employees of the City
12 of New York, and another was a construction worker
13 that testified in the Grand Jury as to the facts and
14 circumstances surrounding that arrest and the Grand
15 Jury, as I said, sir, even though the defendant was
16 shot by the police officer, which he still has a mark
17 and was in the hospital for a very long time, the
18 Grand Jury didn't choose to indict this man.

19 That's not indicated on the report either. Also,
20 the report indicates that the defendant -- and it would
21 appear, Judge, the way I read it, that the FBI gave
22 that report as of the date of his arrest. The report
23 indicates the defendants involvement in drugs, which
24 is absolutely untrue, and, of all things, in prostitution,
25 which is absolutely untrue, and although the defendant

1 has an arrest record which is quite lengthy, I'd like
2 you to look at the record closely, sir, and see that
3 there is nothing whatsoever on that report that has
4 to do either with narcotics or prostitution, and I
5 don't understand, your Honor, how that could be
6 incorporated in the report, and I am going to ask your
7 Honor to disregard that because it's absolutely untrue.

8 The defendant was arrested many times before.
9 You will see that the last four or five arrests
10 possibly were for either bookmaking or the offense for
11 which he stands charged at this time, sir.

12 Judge, the defendant, your Honor should know,
13 in the last year and a half, actually -- how many
14 months is it, 14 months?

15 THE DEFENDANT: Yes.

16 MR. QUAGLIATA: About 14 months, has been very,
17 very actively engaged in the business that is a grocery
18 store and a delicatessen, your Honor, that is located
19 in the building that is owned by his mother-in-law.
20 It is -- his mother-in-law owns a building there, they
21 also live in the building that the mother-in-law
22 owns. When I say they, I mean the defendant, his wife
23 and his family.

24 Now, Judge, he is in that business about 12 to
25 14 hours a day. He has made that business a very, very

1 successful operation. He not only stays in the
2 business and attends to the public but also buys all of
3 the supplies in the business and is there not six, but
4 seven days a week, sir, and I am surprised, really,
5 that that is not indicated in the report.

6 I will tell the Court that this portion of what
7 I am saying I know for a fact because I have been in
8 the store.

9 The store is very, very successful and during
10 conversations that I had with the defendant, although
11 I didn't know, I must admit, anything about his mental
12 history, as far as the store is concerned, I know
13 that -- I have even seen the receipts, Judge, the
14 receipts of the store have gone up week to week to
15 week so that now it is a very, very thriving business
16 and a very successful business, and I'm surprised, sir,
17 that that particular area of the defendant's life,
18 which may be important to your Honor because it has
19 to do with the last year and a half of his life,
20 wherein no a-rests were had as to this defendant, where
21 no crimes were charged to have been committed, where
22 he has -- possibly, your Honor will conclude that he
23 has realized that that is the direction in life that he
24 wants to pursue, and it's incredible to me, sir, that
25 that would not be reflected in the report.

1 THE COURT: Well, I have noted on my copy of
2 the report some of your comments. I suggest, and I did
3 in fact mention this to Mr. Coiro, I'm sure that I
4 would welcome, because I do it as a matter of practice,
5 that I would welcome any memorandum in letter form or
6 otherwise which takes issue with a presentence report
7 or points out facts that are not covered, and so I
8 invite you to submit such a letter.

9 I will see that a copy gets to the Probation
10 Department, that it's made part of this report so that
11 when this report is transmitted throughout the
12 Correctional system it will be accompanied by that
13 letter, do you understand, taking issue with some of
14 the things and pointing out some of the things you said
15 that are not covered.

16 But now, I'm not clear in my own mind--did I
17 understand you to be asking for some further adjourn-
18 ment of this sentence?

19 MR. QUAGLIATA: Yes, Judge. I would ask for
20 a week's adjournment so I could get the memorandum
21 to you and possibly even an opportunity for the
22 Probation Department to check out some of the things
23 that I have said so your Honor can have both sides of
24 the story, one admittedly biased and the other admittedly
25 not biased.

1 I'd like them to check out the record, and as
2 far as his participation in any other crimes, the
3 disposition of those crimes which I can supply to them,
4 and I'd like them to make, Judge, if it's possible,
5 I know they are busy, I'd like them to make another
6 visit to the store. I know they went to the house;
7 go to the store, see what the store looks like, see
8 what the people--as far as how many times the people
9 that come in it have done business with this defendant,
10 over what period of time.

11 I think that would be tremendously helpful to
12 you in passing sentence on this man.

13 THE COURT: Mr. Kaplan, do you have any views
14 concerning that?

15 MR. KAPLAN: Your Honor, I would object to an
16 adjournment at this time. It seems that the report
17 is a very lengthy cataloging of the defendant's life.
18 Based upon the fact that there are some inaccuracies
19 in these reports, everytime I have appeared on sen-
20 tencings defense counsel will point out inaccuracies
21 in a report, and of course, the Court would note such
22 inaccuracies.

23 I believe that what the FBI has advised the
24 Probation Department of, in other words, that the
25 defendant was involved in prostitution and other like

1 activities, could not be substantiated by the Govern-
2 ment at this time.

3 I don't believe the Government could present
4 any evidence to that effect. Based upon those factors,
5 your Honor, and Mr. Quagliata's statements, I believe
6 that your Honor could sentence the defendant today.

7 MR. QUAGLIATA: Judge, if there were just some-
8 thing -- I understand what Mr. Kaplan says and to a
9 certain extent it makes sense, but we are talking about
10 the last year and a half of the defendant's life where
11 no arrests have ensued, where he wasn't forced by any
12 governmental agencies to take a different path in
13 life.

14 I think that is so important, Judge, that your
15 Honor might seriously consider giving him a week so that
16 the Probation Department could come down. They called
17 this defendant, they conclude by stating on the report
18 that this defendant -- the defendant is a danger to
19 society and based upon what they have reported as to
20 their series of facts, I can understand that that is
21 true, but their report is incomplete as to the last
22 year and a half of his life and they have seemed to
23 have taken as facts other things which are not facts and
24 not taken into consideration things which they should
25 know about.

1 Some of them are readily at our fingertips,
2 Judge, I can give them all of that information. As
3 far as my application for an adjournment, sir, this
4 defendant, as your Honor knows, has never evaded this
5 court. He has been on time and so I don't think that
6 the Government could possibly, in good conscience,
7 think that he will not appear when he's wanted to.

8 As I say, Judge, the last year and a half of
9 his life is so important I think maybe that that's
10 what we should do, and I would so move the Court.

11 MR. KAPLAN: Your Honor, a further matter, it
12 indicates in the report --

13 THE COURT: At what page?

14 MR. KAPLAN: At page 14, that he has not been
15 employed, according to his own statements, and that
16 he helps out in the store and that also he's receiving
17 100 percent disability from the Veterans Administration.

18 Now, I don't know what the procedure is with
19 respect to the Veterans Administration, but if the man,
20 as it is said, is suffering from heart problems and from
21 mental problems and receiving 100 percent disability,
22 it is unlikely that he's working 14 hours in a store.

23 Now, if the Probation Department would go during
24 the course of the next week and he should be there working
25 14 hours, it seems likely that Mr. Polisi would try to

1 bring this to the attention of the Probation Department
2 by working 14 hours.

3 But the Probation Department doesn't know what
4 Mr. Polisi has been doing the last year other than what
5 Mr. Polisi has told them and he's already told that
6 he doesn't work 14 hours, that he just helps out from
7 time to time.

8 MR. QUAGLIATA: That is correct, Judge,
9 because --

10 MR. KAPLAN: In a sense, your Honor, the
11 Probation Department going to the store at this point
12 in time is a self-serving statement on the part of
13 Mr. Polisi.

14 MR. QUAGLIATA: Of course it is. He's saying
15 that, all of the things that I am saying to the Court,
16 and when I say he's working there over this extended
17 period of time, Judge, let me explain exactly what I
18 mean.

19 This is his mother-in-law's store. He cannot
20 maintain that many hours in succession, he just can't
21 do it, it's not within his capability. What he does,
22 Judge, is go down there every possible time that he can,
23 even when Mr. Kaplan says, and it's in the report,
24 that he does not work. If you consider a nine to five
25 job where you get a W-2 form working, this defendant

1 does not work. He is working, though, within a
2 different context, to the best of his ability. I
3 didn't say that his mother-in-law is giving him \$500
4 a week to do it, in that context he is not working.

5 If you want to call it helping out, fine. As
6 long as you understand what the helping out is, where
7 he's helping out and how often he goes there.

8 And I say again, he goes there as often as he can
9 and he is indispensable to that store in the workings
10 of that store and he has done a tremendous amount to
11 build up that business and contributes everything that
12 he can.

13 I'm not saying that he can work as a railroad
14 man or a construction worker or that he's the brightest
15 person in the world, I don't say that. But when I say
16 he would, as far as he's concerned and as far as I'm
17 concerned, he does the best that he can and because it's
18 in a period of time which is the last year and a half
19 of his life, I think it's important enough so that we
20 should investigate it and see.

21 If Mr. Kaplan is right and he defrauded the
22 Government, let the Government take his checks away,
23 it's as simple as that, he deserves that, but if what
24 I say is true then I think your Honor would want that
25 brought to his attention prior to sentencing.

1 We are not intimidated by the fact that he's
2 collecting a total disability, there is no doubt about
3 it, and that's more the reason why this Court should
4 take that into consideration because he's doing what
5 others would not do.

6 MR. KAPLAN: Can I ask one question of counsel
7 at this time?

8 Are you representing that Mr. Polisi has
9 received income from the store which he's declared on
10 his income tax return?

11 MR. QUAGLIATA: I didn't say that. I said he
12 works.

13 MR. KAPLAN: He has declared income on his
14 income tax returns in the past year.

15 MR. QUAGLIATA: I didn't say he gets paid even.

16 MR. KAPLAN: Your Honor, I think the point is
17 clear, I think your Honor should take Mr. Quagliata's
18 statements into consideration and sentence the defendant
19 today.

20 THE COURT: Well, I am going to give you the
21 opportunity to submit additional material, but what
22 I am going to do today, and I have had this in mind,
23 was there are other things about this report that I do
24 note regarding this defendant's emotional problems as
25 well as health problems plus a statement here that some

1 records indicate that he may have problems of a
2 psychotic or schizophrenic nature. I was going to send
3 him for study and report at this time, which would
4 take thirty, sixty days at most, and postpone his
5 sentence until that report is received.
6

7 In the meantime, you can have all the time you
8 want, as I say, to compile a memorandum, if you wish,
9 or a letter, it doesn't make any difference to me.

10 MR. QUAGLIATA: Judge, before you impose that
11 sentence, I'd like to state something else. Mr. --
12 there is a gentleman in Mr. LaRossa's office here who
13 will file a notice of appeal, we have turned over the
14 entire file to them, and so we do intend to appeal the
15 case because I believe there are issues, at least
16 they tell me that there are issues that should be
17 raised on appeal.

18 I was going to ask you if the defendant could
19 be continued on \$50,000 bail which he posted, also
20 through his mother-in-law, I might state, until we
21 get a determination from the Appellate Court, and I was
22 going to state in support of that argument that the
23 defendant has always dutifully appeared before this
24 Court on time whenever the Court wanted him to.

25 THE COURT: I am simply sending him for study
and report in view of the problems that I may determine

1 -- to the extent here in this report, so that the
2 Court may have the benefit of a more thorough examina-
3 tion of him and that was my intention.

4 That would inevitably postpone final sentence
5 so there would not be any immediate need, I take it,
6 to file a notice of appeal. Although, I don't want to
7 advise you not to file prompt notice of appeal, you
8 understand, so there won't be any problem of him
9 losing his right to appeal.

10 I am simply saying that he would be returned
11 from the place that he would be sent to for study and
12 report and it would -- the normal period is 30 days.
13 Sometimes they ask for an extension for another 30
14 days to complete the study and report.

15 That would be my present inclination, to get more
16 information concerning this defendant before I impose
17 final sentence.

18 MR. QUAGLIATA: The only thing I can say, of
19 course, if that's what your Honor intends to do we will
20 comply with that, the only thing I could say is that he
21 has been under constant observation by the Veterans
22 Administration and I think what your Honor might well
23 do --

24 THE COURT: All of that I presume will be made
25 available to the Federal authorities in the system

1 and I would certainly assume, since there is a refer-
2 ence in the presentence report to the records of the
3 Veterans Administration, pages 13 and 14, that those
4 records, copies of them, would be available to the
5 Probation Department, would be sent to the institution
6 he would go to for purposes of the study and report.

7 That was really what I was planning to do. I
8 took note of your --

9 MR. QUAGLIATA: Judge, the only thing that I
10 could ask would be this, could he report to this
11 courtroom on Monday and go in, because I'd like him
12 to explain it to his wife. He'll come right in here
13 Monday --

14 THE COURT: I will stay the execution until
15 Monday, certainly. For the present then -- now, is
16 there anything the defendant wishes to say at this
17 time?

18 There will be another hearing.

19 THE DEFENDANT: The only thing I would like to
20 say to your Honor, is that I have been going to the
21 doctor in the Veterans Administration and he told me to
22 tell you that I should be examined and I told the lawyer.

23 MR. QUAGLIATA: That's exactly what the Judge
24 did.

25 THE COURT: I have independently arrived at

1 that so that's why I have decided that before I impose
2 a final sentence here that this examination should be
3 conducted.

4 For the present, I will commit the defendant,
5 Salvatore Polisi, to the custody of the Attorney General
6 for study and report pursuant to Section 4208 of
7 Title 18. Final sentence to be deferred until the
8 receipt of that report. Stayed until Monday at 10:00
9 o'clock.

10 MR. QUAGLIATA: Your Honor, I have one further
11 application, if I may? If the Court is in possession
12 of an extra copy of the Probation Report, I would apply
13 to the Court at this time to take it so that I may
14 see the report before me and not depend on my recollec-
15 tion.

16 If it's not possible, Judge, I will do the
17 best I can.

18 THE COURT: Is a representative of Probation here?

19 PROBATION OFFICER: Right here, your Honor.

20 THE COURT: What is your idea about that?
21 Counsel is asking for a copy of the presentence report.

22 MRS. GREENE: Your Honor, he can read it down-
23 stairs in the Probation Office, if you so order.

24 THE COURT: All right, make notes on it?

25 PROBATION OFFICER: Yes.

* * * *

A 18

NOTICE OF MOTION PURSUANT TO RULE 33 OF THE F.R.C.P.
AND TITLE 18 U.S.C. 4244 AND AFFIDAVIT IN SUPPORT
THEREOF

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA

v.

NICHOLAS VOWTERAS and
NESTOR VOWTERAS

Defendants.
-----x

MOTION PURSUANT TO
RULE 33 F.R.C.P.
AND TITLE 18 U.S.C. §4244

73 Cr. 583

S I R S:

PLEASE TAKE NOTICE, that upon the annexed affirmation of
ROBERT ARON FRIED, dated the 20th day of February, 1974, the annexed
affirmation of JACOB P. LEFKOWITZ, dated the 25th day of February, 1974,
the annexed affirmation of Benjamin Lewis, Esq. dated the 21st day of
February, 1973, the annexed affidavit of Dr. Hyman G. Weitzen dated the
25th day of February, 1974, and the annexed affidavit of Dr. Ferris dated
the 21st day of February, 1974, and all of the proceedings had herein, the
undersigned, on behalf of defendant Nestor Vowteras, will move this Court
before the Honorable Orrin G. Judd, at 10:00 o'clock in the forenoon on the
15th day of ~~February~~ ^{MARCH}, in Courtroom #11 of the United States Courthouse,
225 Cadman Plaza East, Brooklyn, NY for the following:

1. For a new trial pursuant to Rule 33 of the Federal Rules of
Criminal Procedure on the ground of newly discovered evidence of which both
the Court and defense counsel were ignorant at the time of the trial and
preliminary proceedings herein and which could not have been sooner discov-
ered in the exercise of due diligence. The said evidence is not merely cumu-

the defendant was, in fact, substantially prejudiced and deprived of a fair trial; that if such evidence was known at the time of trial it would probably have resulted in a different verdict, all of which more fully appears from the affirmations, affidavits and exhibits attached hereto.

II. On behalf of the defendant, counsel respectfully requests, pursuant to Title 18, United States Code §4244, and Westbrook v. Arizona, 384 U.S. 150 (1966), that the court conduct a hearing and/or cause the defendant to be examined, as to his mental condition to determine whether the defendant was competent to stand trial and/or whether defendant was competent to waive his Constitutional right of effective assistance of counsel and to proceed, as he did, without separate counsel under the circumstances herein, as more fully appears from the affirmations, affidavits and exhibits attached hereto.

Dated: New York, New York
February 21, 1974

JACOB P. LEFKOWITZ
Attorney for Defendant
Nestor Vowteras
150 Broadway
New York, New York 10038

TO: CLERK OF ABOVE COURT
225 CADMAN PLAZA EAST
BROOKLYN, NEW YORK

HON. EDWARD BOYD V
U. S. ATTORNEY FOR THE
EASTERN DISTRICT OF NEW YORK
225 CADMAN PLAZA EAST
BROOKLYN, NEW YORK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK----- x
UNITED STATES OF AMERICA :

v. :

NICHOLAS VOWTERAS and :
NESTOR VOWTERAS, :Defendants. :
----- xAFFIRMATION

73 Cr. 583

ROBERT ARON FRIED, an attorney duly admitted to practice before this Honorable Court hereby affirms the following to be true under the penalties of perjury:

1. I am associated with JACOB P. LEFKOWITZ, attorney for Nestor Vowteras and am familiar with the facts in the above-entitled action and I make this affirmation in support of the motions enumerated in the attached notice of motion.

2. The defendant was charged with conspiracy to violate Title 18, United States Code §201(b) in violation of Title 18, United States Code § 371 and three counts of violation of Title 18, United States Code §201(b) and 2.

3. On November 27, 1973 prior to trial, this Court held an in camera hearing pursuant to United States v. DeBerry, 487 F.2d 448 (2nd Cir. 1973) in order to inquire into the propriety of one attorney representing both Nicholas Vowteras and Nestor Vowteras in light of the clear and obvious conflict of interest involved (TR 1B-15B, 1D-10D). After discussing this matter with Nestor Vowteras, Nicholas Vowteras and Benjamin Lewis, Esq. the following colloquy ensued, as the Court aware of the seriousness of this conflict of interest stated:

THE COURT: ...I am inclined to say you should both have a little more time to consider this. It is my judgment that maybe there is a conflict of interest. Maybe Mr. Nestor has the most at stake, because his brother's testimony....

MR. NICHOLAS VOWTERAS: We are in it together.

MR. NESTOR VOWTERAS: Why don't we take a little more time? Maybe we are on the wrong track. Maybe we are not thinking right.

THE COURT: Let Mr. Nestor come back at 2:30 and tell me whether he has any misgivings. (TR 13B).

And then indicated that Nestor Vowteras come back after lunch at 2:20 and speak to him privately (TR 14B). At 2:20 p.m., Nestor Vowteras returned and apparently waived his right to separate counsel:

THE COURT: This is an in camera proceeding. Have you had time to think about the matter?

MR. NESTOR VOWTERAS: Yes, sir.

THE COURT: I pointed out this morning it might be possible that your brother's testimony would convince the jury that he was innocent, and that your not testifying might result in your being "convicted. Have you decided if you want a separate lawyer?

MR. NESTOR VOWTERAS: Yes, I have decided. I have decided with Mr. Lewis.

THE COURT: You have a right to apply now to set a separate lawyer and to have an adjournment for that purpose. I want to be sure you're waiving that right.

MR. NESTOR VOWTERAS: I'm waiving that right, sir.

THE COURT: If you're convicted and if there is another lawyer who comes in to represent you and he argues that you should have had a separate lawyer, I want you to know, now is the time.

MR. NESTOR VOWTERAS: That's right. You mentioned it to me enough times.

THE COURT: You have had time enough to think about it?

MR. NESTOR VOWTERAS: Yes.

THE COURT: It's a serious matter.

MR. NESTOR VOWTERAS: Yes, I know how serious it is.

THE COURT: I can appreciate your feelings. You have a right to choose your own lawyer. I can't tell you to select somebody else. All I can tell you is you run a risk by keeping the same lawyer. Are you clear in your mind that you want Mr. Lewis to represent both you and your brother?

MR. NESTOR VOWTERAS: Yes. (TR ID-2D)

4. The within cause came to be tried before the Honorable Orrin G. Judd and a jury on November 27, 1973 and resulted in a jury verdict on December 7, 1973 of guilty on all counts with respect to Nestor Vowteras.

5. Since the completion of said trial and on or about January 10, 1974, after being retained by Nicholas Vowteras to handle the appeal in the above case, Jacob P. Lefkowitz, Esq. discovered for the first time certain facts hereinafter set forth, which Benjamin Lewis, Esq. trial counsel for Nestor Vowteras did not and could not discover before trial in the exercise of due diligence for the reasons that are set forth in the attached affirmation of Benjamin Lewis, Esq. (see attached affirmation of Benjamin Lewis, Esq.)

6. The said evidence is not cumulative or impeaching in nature, in that no evidence of the said facts was produced prior to or upon the trial

by either counsel for the defendant or counsel for the United States. The said evidence is of such a nature and so material that it would probably produce:

- i) a determination that defendant was not competent to stand trial and/or
- ii) defendant did not competently waive the right to effective assistance of counsel in the DeBarry hearing that took place prior to trial or
- iii) a different verdict had the jury been made aware of the mental and emotional condition of the defendant under the circumstances of the acts charged herein for the reason that: due to the nature of the offense charged and of the entrapment defense relied upon by trial counsel, had the jury been aware of defendant's mental and emotional state, it is likely that the jurors herein would have found not only Nestor Vowteras but also Nicholas Vowteras not guilty on all counts. (See POINT TWO in the accompanying memorandum of law.)

7. The new evidence herein referred to is set forth at length in the affirmations and affidavits of Jacob P. Lefkowitz, Esq., Dr. Weitzen, and Dr. Ferris, attached to this motion.

8. This new evidence is also the basis for the motion pursuant to Title 18, United States Code §4244 requesting that the court conduct a hearing and/or cause the defendant to be examined as to his mental condition.

9. Legal support for the various motions herein is set forth in the accompanying memorandum of law.

WHEREFORE, affirmant respectfully requests that this court enter an order granting, in full, the relief requested.

Dated: New York, New York
February 20th, 1974

ROBERT ARON FRIED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA,

-against-

NICHOLAS VOWTERAS and
NESTOR VOWTERAS,

Defendants.

AFFIRMATION

73 Cr. 583

-----x
JACOB P. LEFKOWITZ, an attorney duly admitted to practice
before this Honorable Court hereby affirms the following to be true under
the penalties of perjury:

That I am the attorney for Nestor Vowteras in the above-entitled
action and make this affirmation to show that the evidence upon which this
motion is based is, in fact, newly discovered.

When I was retained by Nicholas Vowteras to handle the appeal in
the above case, an appointment had been made for me to meet Nestor Vowteras
that evening. In the interim, I read the minutes of the proceedings that took
place in camera before U. S. District Judge Orrin G. Judd, the trial justice,
and Nestor Vowteras. I was rather amazed at one of the answers that he
gave to the judge when his Honor said "If you're convicted and if there is
another lawyer who comes in to represent you and he argues that you should
have had a separate lawyer, I want you to know, now is the time." Nestor
Vowteras replied "That's right. You mentioned it to me enough times."
The answer struck me as impertinent and irrational, and not congruous with

what I had been told about him by his brother as an astute businessman. When I met him that night at his premises, I saw that he was busily engaged at a front desk in the office of Argo Compressor Corporation. About fifteen minutes later, when he was called into the private office by his brother Nicholas and introduced to me, he impressed me with his business-like attitude and told me how many hours he had been working and in all respects, appeared to be the part; namely that of a busy, competent businessman.

Patiently and doggedly, I led the conversation to his questions and answers by U. S. District Court Judge Judd and himself prior to the trial before lunch, and the same day when he returned after lunch and prior to the commencement of the trial. His answers and reactions were just as pungent and irrational. When I pressed him on the irrationality and tried to tie that up with his need to see Dr. Hyman G. Weitzen his psychiatrist whom he had been seeing for many years, his response was "I only see Dr. Weitzen when I'm depressed. All I do is talk and he listens and because I have confidence in him, I feel better." In response to my inquiry if that's all Dr. Weitzen does for him, the answer was yes. When I pressed him further as to his disrespectful answer to the Judge, as to getting a separate lawyer, he said "Oh that, I don't know whether I knew what I was doing." He told me that when he eats sweets of any kind, he has a tendency to not know what he is doing or saying and sometimes blacks out completely and that he had been seeing Dr. Ferris, who had been treating him and who could vouch for the correctness of what he was telling me.

I questioned him "Did you consult with anyone after the Judge told you to do so and after he informed you that you ought to get a separate

lawyer?" His reply was "I went outside and I told my brother and Lewis, his lawyer what the Judge said" and Lewis told him that he would have to make the decision and his reply was that he will stay with Lewis. There was no consultation, he did not question anyone else and he was so upset that he did not go to lunch with his brother and Lewis but went by himself to the cafeteria in the Internal Revenue Service building basement where he had some sweet cake and coffee, with sugar.

I subsequently spoke to Dr. Ferris who told me that he had been treating Nestor Vowteras and that his so-called black out which he attributes to eating sweets is a figment of his imagination. Dr. Ferris then informed me that this matter of eating sweets is only a small visible symptom of a far greater problem and that Nestor puts the blame on eating sweets when it is in fact indeed due to his emotional state of manic depression. (see affidavit attached of Dr. Ferris). I then spoke to Mr. Benjamin Lewis, his attorney who tried the case and asked him if he was aware of the incompetent state of Nestor Vowteras. His reply was that based on his operation of a substantial business employing 40 people, he could not believe him to be irrational or incompetent. He then stated, that while Nestor appeared to him to be somewhat eccentric and naive, he was an astute and capable businessman, with a warm relationship with his brother Nicholas and his family; that if Nestor was, indeed, incompetent he was unaware of it either prior to or at the time of the trial. I then asked him if he was aware that Nestor had been seeing a psychiatrist, Dr. Weitzen. He said, that he had, in fact, met with Dr. Weitzen but nothing developed from that meeting (see affirmation attached of Benjamin Lewis, Esq.).

As a result of the above information, I then spoke to Dr. Hyman G. Weitzen concerning Nestor's condition and was informed that, yes, he had been treating Nestor for a number of years due to his chronic and severe depression. I then asked him if it was possible that Nestor could be at times irrational or out of touch with reality; that is, at times, to be incompetent to make important decisions. His reply was yes, that Nestor when in a severely depressed state and faced with a serious problem concerning unfamiliar stresses would be capable, in fact, likely to make an irrational or inconsistent decision entirely out of touch with objective reality in order to avoid an unpleasant situation and resolve the problem as quickly as possible (see attached affidavit of Dr. Hyman G. Weitzen). I then asked him if he recalled a meeting with Benjamin Lewis, Nestor Vowteras' lawyer, concerning Nestor's condition. His reply was no, I don't recall the meeting and further, if such meeting had occurred he didn't keep notes or records which would enable him to recall the substance of that meeting.

The information above contained, and that detailed in the affirmation of Benjamin Lewis, Esq., and the affidavits of Drs. Ferris and Weitzen, was all discovered by my investigation subsequent to the trial of this action, and is the factual basis for the present motion. It is newly discovered evidence that raises a substantial question of whether Nestor Vowteras, under the circumstances, was competent either to stand trial and/or waive his right to separate counsel as is required by due process.

Dated: New York, New York
February 25, 1974

JACOB P. LEFKOWITZ

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA

-against-

AFFIRMATION

NICHOLAS VOWTERAS and
NESTOR VOWTERAS,

73 Cr. 583

Defendants.

-----x

BENJAMIN LEWIS, an attorney at law, duly admitted to practice in the United States District Court for the Eastern District of New York, hereby affirms the following to be true under the penalties of perjury:

I represented the defendants, Nestor Vowceras (Nestor) and Nicholas Vowteras (Nicholas), the defendants in the within cause that resulted in a jury verdict on December 7, 1973, of guilty on all counts in respect to Nestor and guilty to counts One and Four in respect to Nicholas.

I have read the within motion and hereby state that prior to and at the time of the trial I was ignorant of the facts, discovered subsequent to trial by Jacob P. Lefkowitz, Esq. concerning Nestor's mental condition.

I was originally retained by Nicholas Vowteras to represent Nicholas and Nestor in the within action. When I first

met Nestor I found him to be a conscientious, hard worker, operating a substantial business employing forty (40) people. While Nestor, at times appeared to be somewhat "eccentric" and moody, I could not then have believed him to be irrational or incompetent based upon my observation of him primarily in the limited, familiar world of his business which he had operated, with his brother for over thirty years. He appeared to have a very warm, close relationship with his older brother Nicholas and in their personal relationship always consulted with his brother and relied on his advice.

During the course of our discussions, it came to my attention that Nestor had once had a gambling "problem" and at times he would become depressed and had, therefore, for a number of years, occasionally been seeing a psychiatrist, Dr. Hyman G. Weitzen of 55 East 80th Street. He stated that he only sees Dr. Weitzen when he becomes depressed and that he speaks to Dr. Weitzen which causes him to feel better. I then asked him if that was all, and he replied yes.

Subsequent to and as a result of this conversation, my partner, David L. Kitzes, Esq. and I made an appointment to meet with Dr. Weitzen. On June 15, 1973, we met with Dr. Weitzen and spoke with him about Nestor Vowteras. At this meeting, I found Dr. Weitzen to be extremely passive and non-communicative. He spoke very little except to confirm what Nestor had told me. That is, Nestor originally came to him about a compulsive gambling

over for the past 15 years; that Nestor comes and speaks to him and that because Nestor has confidence in him as a supportive figure, Nestor feels better. He did not volunteer any further information nor consult any records or notes.

As a result of the above, I had no further reason to investigate this area in greater detail. It is apparent, now, that Nestor was and is extremely reticent about discussing or even disclosing his problems; and in fact, seems at times to be unaware of the seriousness of his problems. That is, he appears to be completely unaware of those times, when in a state of severe depression, he acts quite irrationally and inconsistently.

On the date of the DeBerry hearing before this Court, on November 27, 1973, Nestor appeared to be very upset and unhappy, withdrawn and uncommunicative, with Nicholas doing most of the talking. However, I simply attributed this to the normal reaction of a man, inexperienced in the ways of the law, facing trial on a serious criminal charge.

After the morning part of the DeBerry hearing, I spoke only briefly with Nestor. He appeared extremely upset and distant. He restated what the Judge had said and I told him he would have to make the decision and his reply was that he would stay with me. He then stated that he wanted to be alone and withdrew to have lunch alone. I did not speak with Nestor again until after the DeBerry hearing and was not present when he purportedly waived his right to separate counsel.

Had I been aware of the facts concerning Nestor's mental condition my advice to him may have differed considerably concerning both the question of separate counsel and defense strategy.

Dated: New York, New York
February 21, 1974

BENJAMIN LEWIS, ESQ.
Attorney for Nicholas Vowteras

HYMAN G. WEITZEN, M.D., P.C.
55 EAST 80TH STREET
NEW YORK, NEW YORK 10021

STATE OF NEW YORK)
) . SS:
COUNTY OF NEW YORK)

HYMAN G. WEITZEN, M. D., being duly sworn, deposes and says:

I am a doctor of medicine, duly licensed by the State of New York and engaged in the practice of neuropsychiatry at 55 East 80th Street, New York, N. Y. I am a graduate of New York University College of Medicine, New York, in 1938, and began my private practice in neuropsychiatry in the City of New York in 1942. My hospital associations are:

1. Director of Neuropsychiatry at The French-Polyclinic Medical Center.
2. Associate Attending Physician at the Neurological Institute of N. Y.
3. Assistant Clinical Professor at Columbia College of Physicians and Surgeons.

I was consulted by Nestor Vowteras first in 1955 for the problem of gambling and the lavish spending of money that he was indulging in, in circumscribed periods. It soon became apparent that these "attacks" were truly depressive equivalents, occurring about the time he was basically depressed. During these periods his judgment, particularly concerning emotionally loaded content, was quite poor and he knew well enough to come to see me during these periods for emotional support and advice. My impression was that he was suffering from a recurrent depressive state and that often after a visit or two his mood would improve as did his judgment.

At times his mood of depression would last for longer periods of time, which would require more frequent and prolonged visits with me, at which time it became more apparent that during these states his judgment was faulty.

During such periods Nestor might plunge into betting with no thought given to the possibility of losing or realizing the consequences of such a loss. At these times there would be definite impairment of his value judgments, particularly in relationship to money.

Since Nestor Vowteras has been under my care, I have learned of the overwhelming influence his older brother, Nicholas Vowteras, has had over him. This was particularly true in the realm outside of business. Nestor has warm and close feelings for his brother and would not likely make a decision that would be, in his mind, a threat to their relationship. He always has had a neurotic fear of offending his brother and often made unreasonable concessions to him.

I have carefully read the transcript of the in camera proceedings before United States District Court Judge Orrin G. Judd, dated November 27, 1973, wherein Nestor Vowteras was asked to make a decision as to whether he should obtain separate counsel to represent him at the trial. Although I was personally not present at the time, it would be my impression that when Nestor was advised by Judge Judd of the serious nature of the conflict of interest herein, and, in effect, having been told it would be likely that he might be convicted if he did not retain separate counsel, he perceived this as a threat to his relationship to his brother rather than the obvious conclusion that he might or might not be convicted and possibly go to jail.

Nestor Vowteras has always had a confused concept of himself in relationship to his brother. He undoubtedly considered it a disloyalty to have separate lawyers. He was unable to bring himself to the choice of his own counsel because of his neurotic sense of loyalty. He lacked the capacity at the time to choose for his own best interest because of this intense sense of loyalty and in so doing acted against Judge Judd's obvious warning. His mental state may well have been so confused that he was unable to understand the significance of choosing his separate counsel.

It is my considered opinion, knowing him as I do over an extended period of time, that Nestor Vowteras would be torn by the sense of loyalty to his brother and the depressive nature of his personality in times of stress so that he would not likely make a competent decision as to whether or not he should obtain separate counsel to represent him at the trial. In fact, I would doubt that he was capable at that time of making any rational judgment concerning any unfamiliar matter of any importance.

Sworn to before me this
25 day of February, 1974.

[Signature]

Hyman G. Weitzen
Hyman G. Weitzen, M.D.

Louis S. Ferris, M. D.

30 CENTRAL PARK SOUTH
NEW YORK 19, N. Y.

STATE OF NEW YORK
CITY OF NEW YORK
COUNTY OF NEW YORK

Louis S. Ferris, M.D. being duly sworn deposes and says:

That I am a doctor of medicine, duly licensed by the State of New York since 1942 and engaged in the practice of my profession at 30 Central Park South, New York City. I am a graduate of the University of Athens, Greece, 1938; served with the United States Army from 1943 to 1946 as Captain in the Medical Corps; started my private practice of medicine in the City of New York in 1947 specializing in internal medicine. My hospital associations are:

Associate Attending in Medicine at St. Clare's
Hospital, New York City

Assistant Instructor in Medicine, New York Medical
College, Flower & Fifth Ave. Hospital, New
York City,

Assistant Physician, Metropolitan Hospital, New York
City.

I have known Nestor Vowteres since 1969. He has been a patient of mine since 1970. From my first observation and examination of Nestor Vowteres he complained of succumbing to extreme fatigue, depression after ingestion of sweets. After comprehensive

Louis S. Ferris, M. D.

30 CENTRAL PARK SOUTH
NEW YORK 19, N. Y.

clinical and laboratory evaluations I was convinced that his complaints were not due to any organic condition but were a manifestation of depression. Soon thereafter I had the opportunity to observe periods of extreme Euphoria following in a cyclic pattern which, in my judgement, established the classic picture of Manic Depressive Disease.

I strongly urged Mr. Vowteros to obtain psychiatric treatment. When he advised me that he had been seeing Doctor Helman Weitzen, Psychiatrist, of 55 East 80th St., New York City, and since there was no improvement in the condition, I took upon myself to call Dr. Weitzen at a later date and told him that my impression was that Nestor's condition was of Manic Depressive Disease and that in my opinion he needed intensive psychiatric treatment and care. I found it necessary to prescribe on many occasions various psychotropic drugs. My observation from my close association with him as a physician and friend convinced me that the type of Manic Depressive Disease was of a psychotic nature with paranoid traits - having accused people, friends and immediate members of the family of unrealistic actions totally out of touch with reality, and making irrational judgments.

I had the occasion to see Mr. Vowteros in severe

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Louis S. Ferris, M. D.

30 CENTRAL PARK SOUTH
NEW YORK 19, N. Y.

depression to the point of Catatonic State, both in his home and in my office as recent as November and December, 1973. I was called to his home in desperation to help him out of this state on innumerable occasions. My records indicate that this condition was present when he was in my office on November 3, 1973 and November 7, 1973 at which time I found it necessary to prescribe Lithium as specific for Manic Depressive reactions.

Having read a transcript of proceedings in camera before Monorable Orrin Judd, U.S. District Court Judge on Nov. 27, 1973, wherein Nestor Vowteres was asked to make a decision as to whether he should obtain a separate counsel to represent him at the trial, and wherein Judge Judd, having carefully advised him of the importance of this decision and told him to take some time that day on November 27, 1973 to consult and make a decision and return to him after lunch and advise him if he made such decision, and having learned from Nestor Vowteres that after leaving the Judge's court room he spoke for a few moments to his lawyer and his lawyer's associate and his brother, Nicholas, outside of the court room telling them of the decision that he had to make, and that he spoke to no one else, and that he would not join any of the above mentioned for lunch but instead withdrew to the basement cafeteria in the court house where

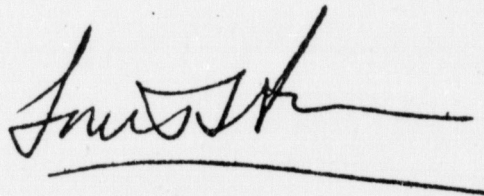
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Louis S. Ferris, M. D.

30 CENTRAL PARK SOUTH
NEW YORK 19, N. Y.

he had coffee and a sweet crumb bun - the very substance, namely sweets, which he was always complaining made him extremely tired, fatigued and depressed.

It is my considered opinion that Nestor Vowteres was at that time incapable of making any rational judgment and was incapable of making a competent decision as to whether or not he should obtain separate counsel to represent him at the trial.



Sworn to before me this
21st day of February, 1974

RICHARD A. LEFKOWITZ

NOTARY PUBLIC STATE OF NEW YORK

NO. 24-229685

QUALIFIED IN KING COUNTY

COMMISSION EXPIRES MARCH 3, 1975

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ

being duly sworn,
deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 10th day of March 19 75 he served a copy of the within
Government's Appendix

by placing the same in a properly postpaid franked envelope addressed to:

LaRossa, Shargel & Fischetti, Esqs.

522 Fifth Avenue

New York, N. Y. 10036

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this

10th day of March 19 75

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-110300
Qualified in Kings County
Commission Expires March 30, 19